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No. 02 - 1507

In The

Supreme Court of the United States

HENRY TORROMEO AND MDR CORPORATION,

Petitioners,

v.

TOWN OF FREMONT,

Respondent.

On Petition for Writ Of Certiorari To
The Supreme Court of New Hampshire

SUPPLEMENTAL APPENDIX TO PETITIONERS' REPLY

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18 pp

Henry Torromeo and MDR Corporation (Petitioners), respectfully file this Supplemental Appendix ("Supp. App.") to their Reply Brief.

Petitioners' Reply Brief at page 8, fn 6, explained that a transcript had been ordered for the oral argument before the New Hampshire Supreme Court held on July 11, 2002. This Supplemental Appendix provides the transcript from that hearing. An accompanying affidavit is filed attesting that the transcript is a true and accurate account of the statements made at the July 11, 2002 hearing. Petitioners' Counsel will maintain custody of the tape provided by the New Hampshire Supreme Court.

The transcript shows that the New Hampshire Supreme Court asked counsel for both sides whether *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency,* 535 U.S. 302 (2002), should impact its decision. *See* Supp. App. 3, 14-15. Additionally, counsel for Petitioners here argued that this case concerns issues addressed in *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304 (1987). *See* Supp. App. 8.

DATED: May 30, 2003

Respectfully Submitted,

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SUPPLEMENTAL APPENDIX

TRANSCRIPT OF ORAL ARGUMENT
STATE OF NEW HAMPSHIRE SUPREME COURT
DOCKET NUMBER 2001-612
DATE: 7/11/02

Henry Torromeo v. Town of Fremont
MDR v. Town of Fremont

ATTORNEY FOR TOWN OF FREMONT:

May it please the Court, I am Attorney John Ryan. I represent the Town of Fremont. I have members of the Board of Selectmen here today sitting on that side of the courtroom. This is an appeal from the lower court's ruling that the Plaintiffs were entitled to proceed to prove and recover damages for the temporary loss of the economic use of the plaintiffs' property, by reason of the imposition of a procedurally defective growth control ordinance. The lower court was right, your Honors, when it denied the plaintiffs' motion for summary judgment on the issue of liability. That denial was based on the defendant, the town's argument that since the growth control ordinance in question had not been found unconstitutional, no taking had occurred and that the Town could not be liable for inverse condemnation damages. The lower court was wrong when it later reversed that decision and ruled that the plaintiffs' were entitled to proceed and recover damages, prove and recover damages, regardless, of whether the growth control ordinance was unconstitutional.

Under New Hampshire law, municipalities are liable for so-called, inverse condemnation takings, only, where the ordinance itself is found to be unconstitutional and a zoning ordinance or land use regulation is unconstitutional only if it is found to be substantively, arbitrary, unreasonable and bears no relationship to the health, safety and welfare of the community. In this case, none of those findings were made by the lower court. What was found, was that a 1987 town meeting vote

twelve years before this ordinance was put into effect which purported to prove, provide the statutory authorization for the development of a capital improvement program was procedurally defective. And what had happened was that the statute requires the adoption of a capital improvement program as a statutory prerequisite to a growth control ordinance. The lower court found that the 1999 growth control ordinance was invalid, despite the fact that the town had, in fact, promulgated capital improvement programs and adopted them since 1987. The lower court order giving rise to this appeal, acknowledged that this flaw was a procedural error in nature, and that's at page 161 of the appendix, to the Notice of Appeal.

This court has held that the procedural error, in the enactment of the zoning ordinance, is insufficient to support a takings finding and that's the Dugas v. Conway case, cited in our brief. Therefore in the absence of a finding that the ordinance is unconstitutional, the town cannot be liable for any damages claimed by the plaintiffs. And it should be noted, that this is not a case where once having been told by the court that its ordinance was invalid, that the town, nevertheless, went ahead and enforced it. What happened was, the town defended the original allegation, that its ordinance was procedurally defective, and at the conclusion of that contest, having been advised that the 1987 proceedings were defective, the building permits sought by the plaintiff were, in fact, issued. So, not only, has there been no finding that the growth control ordinance was substantively, arbitrary, unreasonable, there has also been no finding that the town has acted in bad faith and while it was contesting the first cases, which gave rise to this case. The question therefore becomes, your Honors, is this court going to change established law and allow recovery for the temporary loss of the economic of property where that loss, is the result of a procedurally defective ordinance?

COURT: Wasn't the town on notice though, from 1984 that it had to adopt a validly legally sufficient act before enacting and enforcing a growth control ordinance, didn't they know that then and haven't they still, as of this date, failed to do that?

A: No, the answer to that is clearly, no. In 1987, the town, at its annual town meeting, thought that it had properly authorized its agencies to develop a capital improvement program. Nobody told the town in 1987, 1988 all the way until the court order, in this case, in 2000 that that was a procedurally defective process. They were not told that until this court said that, until the lower court said that, as a result of the initial litigation in this case.

COURT: Even if you agreed with everything being put forward by your opponents, even if you did, wouldn't the, that recent United States Supreme Court case, relative to Lake Tahoe and temporary loss of use have some bearing on the outcome of this case?

A: No, because that case, your honor, did not deal with the question of whether or not an ordinance which is procedurally defective as opposed to substantively defective gives rise to the right to recover damages in an inverse condemnation case. That is the distinction.

COURT: I understand that and maybe I didn't ask my question correctly. Suppose we did change, what you say is settled law and said they are entitled here regardless of what it used to be to get this element of damage because it was a taking. Doesn't that case then come into play so even if he were so inclined he can't do it?

A: Yes, I think that's also it, that's also true. You have to find that the ordinance itself, in this case, the growth control ordinance, is so wrong in its substance that it doesn't

accomplish a reasonable and legitimate police power goal of the municipality.

COURT: Why is that the distinction if the effect on the planning is the same, that is, that he can't use his property during the period that the invalid unconstitutional ordinance is in effect? The economic impact on him is the same, regardless of the reasons for the invalidity of the ordinance.

A: That may be the case, your Honor

COURT: So why is there a distinction in terms of its ramifications?

A: Because in order to rise to the height of requiring towns to compensate land owners, monetarily, for the loss of economic use of property, the ordinance itself has to be found unconstitutional.

COURT: I understand that, why?

A: Because, that is the foundation of the Fifth Amendment of the United States Constitution and the Amendment to the New Hampshire Constitution, and that is, that unless the town has acted in a manner which strips that property owner of a constitutional right, as opposed to having a procedurally defective ordinance, that has to be the basis, otherwise, this is what will happen.

And I'll give you an example. Suppose a town passes a wetland setback ordinance that says you can't build within a hundred feet of wetland, and the ordinance is later found to be procedurally defective because it doesn't comply with the zoning enactment statute. Let's say that instead of having two public hearings, there was only one public hearing or that instead of having two places of notice posted, there was only one notice posted. The land owner comes forward and says, I

could have used my land that lies within this 100 feet for an economic use, the ordinance that they now imposed on me, which I have now proven was procedurally defective, entitles me to the temporary loss of the economic use of that 100 feet of my property. That is not the law and shouldn't be the law. The reason it shouldn't be the law is that the ordinance itself hasn't caused the landowner the damage, he's claiming the procedural defect is causing the damage and that is not, that does not give rise to compensable damages under inverse condemnation takings, as it exists and it should exist.

COURT: Did the plaintiff here ask the judge to hold or find as a preliminary matter that the ordinance was unconstitutional and that Judge McHugh kind of decides that, is that right?

A: Well he, no, what he asked was for a ruling that he did not have to prove that the ordinance was unconstitutional, substantively.

COURT: But that the town continued to enforce the ordinance that the trial court had found was invalid.

A: No, that's not true. After the court ruled, that in both of these cases, the Torromeo case and the MDR case, I want this clearly understood, after the court ruled and those orders became final the building permits sought by the plaintiffs were immediately issued. The time of the damages that were filed in the file trial on damages, related to that window, between the date of the enactment of the ordinance and the date that the court found that the ordinance was invalid, not afterwards, because the town in fact, issued the permits when it was told that its ordinance was invalid in the final orders.

COURT: So that plaintiff is incorrect here? And says that for a period of nine months they continued to enforce an invalid ....

A: No, he's not incorrect, the ordinance was enacted in March of 1999, ok? The ordinance was challenged, in terms of its validity, during the next nine-month period. Then the lower court said Judge Murphy's order came out, the ordinance is invalid. When this court did not accept the appeal that the town took, the town immediately issued the building permits, that order became final. So we both have a situation where the lower court has said its invalid and the town can, nevertheless continue to enforce it.

COURT: So you draw a distinction that if a town enforces an unconstitutional ordinance, even if it doesn't know it's unconstitutional it's subject to damages?
A: This is not an unconstitutional ordinance.

COURT: I know that, but what you're saying, even if they don't know it's unconstitutional they're subject to damages? But it can continue to enforce an ordinance which someone claims is invalid, there is no similarity there? There's no right to recover?
A: If the ordinance is invalid because of a procedural error, a town is not subject to liability for inverse condemnation damages. If the town enforces an ordinance as it did in Burrows v. Keene, that is clearly unconstitutional on its face, then the town takes the risk. The town does not take a risk of inverse condemnation damages where the ordinance is only procedurally defective. It only takes that risk if it is substantively unconstitutional.

COURT: If we agree with your position then, do we remand this case for a trial or hearing on the constitutionality of the ordinance?

A: The plaintiff has not raised that question, if the plaintiff wants to bring a separate action claiming the ordinance is unconstitutional, I suppose they could do so.

COURT: They already asked the court to clarify the Constitution with this request.

A: He hasn't, if, that I suppose, is one alternative, it could be remanded back for further trial on whether or not the ordinance is unconstitutional if the plaintiff wants to proceed that way.

COURT: The problem I have is that if Judge Murphy ruled that the ordinance was invalid on procedural grounds he didn't reach the constitutional issue. So that, essentially under your argument, judges would have to reach constitutional issues with respect to these ordinances and not just their rulings on procedural issues. Sort of runs contrary to the general rule of when you reach constitutional issues.

A: Well, but the plaintiff, in the first case, your Honor, did not request the court to award damages. He requested the court to find that the ordinance was invalid on procedural grounds. That's all I have your Honor. Thank you.

ATTORNEY FOR HENRY TORROMEO AND MDR CORPORATION:

May it please the court, my name is Sumner Kalman. I practice in Plaistow, New Hampshire. This is Thea Valvanis who is an attorney that works with me and has worked with me on this case. First, let me say that I think that if the court affirms the decision in this case, that a substantial volume of appeals taken from decisions that towns make in this state, would be reduced and appeals to this court would be reduced.

My clients are small business type people, they build homes. MDR builds homes for a living, MDR stands for Mark, Russell, and Daniel, they had a fourteen lot subdivision in Fremont. They were allowed to have five building permits and told that they could not apply or expect to receive the remaining nine building permits for at least a year because there were vested subdivisions in town that may be entitled to building permits ahead of them. There was no assurance when they would receive building permits even after a year. They're small business people. As I said, they don't have unlimited amounts of capital. They had to catch the economy when they could and build homes when they could. And needless to say this growth control ordinance put them out of business and meant that those nine lots were not at all useable, which I think, clearly triggers a temporary taking under Lutheran, which is cited in this court's case, Smith v. Town of Wolfeboro.

The word invalid that was used by Judge Murphy in the underlying decision, it was "invalid *ab initio*," which is language that Judge Murphy included in his decision, *ab initio*, from the beginning, I think is pointing toward the Lutheran decision and your use of it in the Smith v. Wolfeboro case where you say "a taking occurs when the application of a regulation to a particular parcel denies the owner of an economically viable use of his or her land." It says, although the board's decision did not permanently deprive the owners of a right to develop their land, it could nevertheless be compensable if it effected a temporary taking. And, what Lutheran, I think says, is that the taking occurs at the point when the town does not issue a building permit. So, the important point is, that is, if, at the point when the town refused to issue a building permit, that's when the potential taking occurred.

We alleged in our initial lawsuit that the regulation, the growth control ordinance itself, was not valid, not legal. Where

the court, I think, is being led astray somewhat is by this use of the word procedural and the concept here that somehow, that's okay. I think Justice Duggan pointing to well, what is unconstitutional, what is the effect on the owner of the land? He can't use his property. Why? Because of a growth control regulation. Well, what is the validity of a growth control regulation? It's invalid and it's invalid, *ab initio*. That's what triggers the taking. Talking about the substantive omission that caused this ordinance to be invalid, our growth control statute specifically requires that a town adopt a master plan and a capital improvement program. The idea of the master plan and the capital improvement program, I believe, is to encourage towns to accept the growth that they are legally required to accept. And as Justice Nadeau pointed out in 1984 in Stoney Brook Development Corp. v. Town of Fremont, this court told the Town of Fremont that growth control ordinances are intended to regulate and not control the timing of development, not the prevention of development. So, a master plan and the capital improvement program are designed to require the town to plan for growth and to develop a capital improvement program so that both can be accommodated in an orderly fashion.

COURT: Doesn't public policy and good government require really legislative bodies be able to act in good faith and not be subject to damages for some defect, the kind of defect that existed here? And shouldn't the plaintiff have to show some kind of malice or some kind of conduct on the part of a town before becoming entitled to damages? Otherwise anytime a body acts by mistake or otherwise it's subject to damages?

A: Well, that's not in our New Hampshire Constitution and certainly it's not in the Fifth Amendment of the United States Constitution, in other words, the Amendment to the Constitution,

the Fifth Amendment says that if there is a taking by the government, then the government should compensate the property owner for the taking. There is certainly nothing in the Fifth Amendment that says that only a taking with malice would generate compensation. This is a situation, inverse condemnation, there are two kinds of taking here, where compensation would be required. That is, one where the state literally takes a piece of land, let's say to build a highway or a regulation. And our position is, which is invalid, which is when the state says we're going to take your property temporarily and it turns out the regulation they're relying on is invalid *ab initio*, then that triggers the constitutional compensation requirement.

COURT: So while the economic impact is the same, the problem is that you want to say that the most severe remedy to deter towns from acting in a way that violates the Constitution, I think there's a question of proportionality as a remedy to the wrong here and, and that's the reason for the rule that town argues. Do you agree that there's a proportionality issue here?

A: No, I don't. I think either the ordinance is invalid or its not and what I was getting to with the capital improvement program was that I don't think the court should be led astray by the concept of procedural error.

COURT: It can be invalid without being unconstitutional.

A: I think the effect of enforcing an invalid regulation can be unconstitutional whether or not, if the balance of the ordinance were sustainable and constitutional that would have supported it.

COURT: That wasn't the question I asked, an ordinance can be invalid without being unconstitutional. Do you agree?

A: Well, no. Because I think it's kind of a trick question, in that …

COURT: It wasn't meant to be.

A: I understand, but conceptually I guess what I'm saying is, what's unconstitutional? What's unconstitutional is that a property owner can't use his property and is being deprived of use of his property as a result of the enforcement of an ordinance that's invalid. Let's say the ordinance itself, I don't think you could have growth control ordinance that isn't supported by a validly adopted capital improvement program, and consider it constitutional. That's the guideline, that's the standard the legislature and this court gave us when it said you had to have a master plan and a capital improvement program in place before you could adopt a growth control ordinance.

COURT: You're saying the constitutionality is two-fold, one is the constitutionality of the ordinance the other is the constitutionality of the taking?

A: Yes, I'll agree with that and the example I'm going to give you is that Attorney Ryan says, and this is the example in my head, I mean I have a little difficulty with this procedural concept because I don't see this as innocuous. The language that was used, for instance, in the Dugas case, I believe, talks about some arcane procedural error, that's Dugas v. Town of Conway, this is not some arcane procedural error. This is an omission of a substantive requirement of a growth control ordinance in this state. That is, a capital improvement program which has to be at least six years in duration and requires the Town to commit to accepting its fair share of growth through the formation of this capital improvement program.

COURT: But, I thought they had one on the books? Didn't they?

A: It was not, well, then I guess also, let's take a look at the underlying statute that would cause a capital improvement program to be valid and that's 674:5 that is significantly captioned "Authorization," and it goes on to say that the legislative, local legislative body may authorize the planning board to prepare and amend a recommended program of municipal capital improvement projects, projected over a period of at least six years, and then it goes on to talk about the details. This is a commitment on the part of a town to accept its fair share of growth by combining a master plan and a capital improvement program so that the mandate that was set out in Stoney Brook v. Fremont is met. That is that they are planning growth, they can't stop it but they've got to plan for it so they can accept their fair share of growth.

So, I'm saying that being led astray by this procedural concept, there's nothing procedurally, you know. I understand, I can understand if it was one of these arcane procedural errors, as referred to in Dugas, this is not one of those. This is an ordinance that I believe is unconstitutional because it doesn't meet the very obvious test of the growth control statute that requires a master plan and capital improvement program as a prerequisite to a growth control ordinance. So, it's so obviously unconstitutional, that to say that if it's invalid, *ab initio* because it fails to meet the threshold requirement of a capital improvement program. I now have the additional burden of going forward and saying, well even if it were valid on that basis, then I have the additional burden of showing, well it would have been unconstitutional for other reasons.

COURT: So are you drawing a distinction between what you call, obviously invalidly adopted and just plain ordinarily invalidly adopted? And, if so, does it mean that anytime a town adopts an ordinance and then follows that ordinance and denies people, any applicant, the right to use their property in accordance with that ordinance that

everybody who's denied that permit, during that period, until the statute of limitations or once somebody determines invalid is entitled to recover damages against the town?
A: I could possibly answer that question, yes. It's a little broad for me to say yes to that. I guess what I would say that if an ordinance were not found to be enforceable because of what you call, some arcane procedural error which is the language.

COURT: How about just procedural error? Never mind arcane.
A: I guess you would have to give me an example, your Honor, of what you meant by procedural.

COURT: Let's go back to Justice Nadeau's question. Let's assume that an ordinance has been in effect for ten or six years and at some point it's determined to have been improperly adopted, procedurally. Is everybody who's suffered damages during that period entitled to recover damages against the town?
A: No. I think

COURT: Where would you draw the line?
A: I think I'd draw the line at arcane, that seems to be the word the court likes. If it's an arcane procedural error, I mean I think you fall into the area of harmless error. I mean there is a whole concept that appellant courts can deal with these kinds of, oh gee, that really is, that is really arcane procedural error and we're not going to let that interfere with good faith enforcement of the ordinance.

That's not what we have in this case, what we have in this case, is that there is an omission of a statutory requirement that the legislative body authorized the capital improvement program and that never happened. There is a statement in the brief that was filed by the town that refers to a warrant article in

the 1987 warrant. Well, the underlying case isn't on appeal here and I don't know, I think we have provided you with enough information so you understand how Judge Murphy came to the conclusion he did, that it was invalid, *ab initio*. But there was never a warrant article on the 1987 warrant that authorized, or purported to authorize, the planning board under 674:5 to generate a capital improvement program. At the conclusion of the meeting, I'm presuming the question was asked, "Is there any other business to come to the meeting?" An ad hoc motion was made discussing a committee being formed to perhaps make recommendations to the planning board involving the police chief and the fire chief and other people in town. It was never warned, there was never a warrant article concerning it, and as Judge Murphy concluded, the motion, the ad hoc motion, made at the end of the meeting didn't authorize the planning board under 674:5 to prepare a capital improvement program either. So this whole procedural path that we're being led down, I don't think is appropriate here.

COURT: Well let's say we're on the substantive path. Suppose we were to agree with you that this was a substantively unconstitutional ordinance, why then, doesn't the Lake Tahoe case eliminate your damages anyway?
A: The Lake Tahoe case, your Honor, I believe deals with...

COURT: Temporary takings.
A: I understand. But, what wasn't there is the invalid regulation. There was no challenge in Tahoe. This is an interesting question. Let's say we have a valid growth control ordinance that was approved, master plan in place, valid capital improvement program in place. A perfectly valid growth control ordinance, which requires that land owners wait nine and one half (9 ½) months to get their building permit. Well, those land owners in Tahoe said, why should I have to wait 9 ½

months to get my building permit? If you think that the public would benefit from a 9 ½ month delay by my getting a building permit, that's fine. But, you should pay me for that 9 ½ months that I'm not having the use of the building permit.

The difference between Tahoe and this case is Tahoe did not challenge the validity of the ordinance and in this case, we did challenge it and we challenged it successfully. I point out that Smith v. Town of Wolfeboro language of this case, which might help explain why Judge Murphy used the word invalid. He could have used several other words to determine that that ordinance was not effective. He chose the word invalid and in Smith v. Town of Wolfeboro, and I'm quoting, "an erroneous planning board decision based on sound authority, must be distinguished from the application of an invalid regulation" and Judge Murphy chose the word "invalid *ab initio*" in describing the Fremont growth control ordinance. And I also point out that four Superior Court Judges have been involved in various phases of these cases and each of them came to the conclusion that plaintiffs had not done nothing wrong and were entitled to compensation and relief and the Town of Fremont has been unsuccessful in each of them. My red light is on so I would suggest that I'm concluded if there are no further questions.

COURT: **Thank you**

A: Thank you

COURT: **Case...**

ATTORNEY FOR TOWN OF FREMONT:

A: May I have a brief moment?

COURT: **How about 30 seconds?**

A: 30 seconds or less. First of all, factually speaking, the lower court didn't find there was no capital improvement program, the town in fact, and these are part of the

exhibits, enacted, adopted and promulgated and put into effect capital improvement programs from 1987 through 1999. Secondly, there is a difference between statutory invalidity and unconstitutionality. They are not to be equated, otherwise we'll run into this procedural problem giving rise to inverse condemnation takings and the scenario that I had set forth before in my example. Thank you.

COURT: Mr. Kalman

ATTORNEY FOR HENRY TORROMEO AND MDR CORPORATION:

A: Can't say no, I'm not going to take the full 30 seconds, but I would point out my first comment that the amount of the litigation that's filed involving planning board appeals and town related appeals, appeals to this court, I believe, firmly would be reduced dramatically, if there was some down side and there were some monetary relief available to people harmed by the enforcement of invalid regulations. Thank you.

COURT: Thank you, case submitted.